

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

LAWRENCE ALLEN FASSLER,
Petitioner-Appellant

vs.

THE UNITED STATES OF AMERICA,
Respondent-Appellee

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Lawrence Fassler
in propria persona
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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

LAWRENCE ALLEN FASSLER,	)	NO. 87-3857
Respondent-Appellee	)	
v.	)	OPINION
UNITED STATES OF AMERICA,	)	Oct. 27, 1988
Respondent-Appellee.	)	

Defendant appealed from order of the United States District Court for the Middle District of Louisiana, John V. parker, Chief Judge, denying his motion for writ of habeas corpus challenging pretrial detention order. The Court of Appeals held that defendant's request for release from pretrial confinement, made in motion for writ of habeas corpus, was moot following defendant's conviction.

Affirmed.

1. **Habeas Corpus (key) 33**

Although statute requiring prompt determination of appeals from pretrial detention orders does not provide exclusive means by which person under indictment can challenge pretrial detention, terms of Bail Reform Act and potential for abuse of writ of habeas corpus and for unnecessary duplication of appeals should ordinarily provide strong incentive for defendants to employ appeals under statute. 18 U.S.C.A. §3145.

2. **Habeas Corpus (key) 87**

Defendant's request for release from pretrial confinement, made in motion for writ of habeas corpus, was moot following defendant's conviction. 28 U.S.C.A. §2241(c)(3); 18 U.S.C.A. §3145.

3. **Bail (key) 42**

Whether defendant will suffer severe financial hardship is not relevant to determination of whether pretrial detention of defendant is warranted; financial resources of defendant are relevant only insofar as they reflect likelihood that

defendant will appear before court when required. 18 U.S.C.A. §3142(g).

Appeal from the United States District Court for the Middle District of Louisiana.

Before REAVLEY, POLITZ, and JONES, Circuit Judges.

PER CURIAM:

Appellant Fassler was convicted and is now incarcerated pending appeal of his conviction for knowingly and intentionally possessing 162 pounds of marijuana with intent to distribute. Fassler was ordered detained prior to trial pursuant to the Bail Reform Act, 18 U.S.C. §3142 et seq. In this appeal, he purports to seek habeas corpus relief because of the illegality of his pretrial detention. The relief he seeks is plainly not available. We affirm the district court's denial of relief, with cautionary notes to courts and detainees alike concerning their responsibilities under the Bail Reform Act.

Fassler was arrested May 28, 1987, after he was videotaped in the act of receiving marijuana from a government informant. At the time, he was on release pending trial on drug charges in Arizona. The government moved for pretrial detention at his initial appearance before the magistrate the next day, as is required to preserve its right to such relief. United States v. O'Shaughnessy, 764 F.2d 1035, 1038 (5th Cir. 1985). Two pretrial detention hearings were then held June 12[1] and June 19, 1987, and the defendant offered evidence and testimony of various sorts. The matter was again continued until June 24 at defendant's request. The magistrate then determined that, although some earlier grounds for defendant's detention no longer applied, there was probable cause that the defendant had committed an offense for which a maximum term of imprisonment exceeding ten years was prescribed

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[1]The hearing was set for June 2nd originally, but it was continued at defendant's request.

in the Controlled Substances Act. Further, the magistrate found that the defendant had failed to rebut the presumption that no condition would reasonably assure Fassler's appearance at trial and the safety of the community.

Fassler had been advised of his right to appeal the detention order to the district court pursuant to 18 U.S.C. §3145. He so moved on August 11, and the district court heard oral argument and additional evidence and took the matter under advisement until September 3. On September 10, 1987, five days prior to trial, the trial court affirmed the magistrate's detention order after a de novo review of the evidence and arguments of the parties. Fassler did not appeal this decision to the Court of Appeals as is provided by 18 U.S.C. §3145.

Instead, Fassler filed a motion for writ of habeas corpus with the district court on September 10, alleging broad-based challenges to the detention order. Fassler contended that the detention order

was being used illegally and unconstitutionally as a punitive tool to force him to plead guilty; that it was not imposed by an impartial magistrate; that it placed an excessive and unjustified burden upon his defense and impaired his trial preparation; and that it was based on accusations of heroin trafficking that had no evidentiary foundation. The district court denied this petition on September 30, after Fassler had been convicted at trial. The court elected to treat the petition as a writ of habeas corpus prior to trial, sought pursuant to 28 U.S.C. §2241(c)(3). The court found his request for relief from custody to be mooted by his conviction and subsequent legal detention pursuant to 18 U.S.C. §3143. The court additionally denied Fassler's petition on the merits, finding that most of his complaints had been resolved in the court's prior de novo review of the pretrial detention order. Fassler has appealed.

[1] That we have jurisdiction does not mean that Fassler has sought an appropriate remedy for

pretrial detention or that the case is not moot. For whatever reason, Fassler bypassed the expedited appeal procedure noted by the Supreme Court as an essential safeguard provided by the Bail Reform Act. 18 U.S.C. §3145; United States v. Salerno, ___ U.S. ___, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). Section 3145 provides that appeals to the district court and court of appeals from pretrial detention orders shall be determined promptly. In this case Fassler was tried expeditiously and it might have been difficult to secure prompt appellate review within the terms of the statute.[2] Acting cautiously, we decline to hold that §3145 provides the exclusive means by which a person under indictment can challenge his pretrial detention. Nevertheless, the terms of the Bail Reform Act and the potential for abuse of the writ and for unnecessary duplication of appeals, as

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[2]In an effort to expedite appeals under the Bail Reform Act, our Court has adopted filing forms that pretermit the necessity for the preparation of formal briefs. This measure alone should save considerable time on appeal.

demonstrated below, should ordinarily provide strong incentive for defendants to employ Section 3145 appeals.

[2] Because Fassler is now legally in federal custody, we must hold that his request for release from pretrial confinement is moot. See, e.g., Medina v. People of the State of California, 429 F.2d 1392 (9th Cir. 1970) (appeal from writ of habeas corpus for unconstitutional bail revocation mooted by defendant's subsequent conviction); Traber v. United States, 466 F.2d 483, 485 (5th Cir. 1972) (issue of excessive bond not appropriately raised in §2255 motion).[3]

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[3]We are mindful of the Supreme Court's decision in Carafas v. LaVallee, 391 U.S. 234, 238, 88 S.Ct. 1556, 1559, 20 L.Ed.2d 554 (1968) (writ of habeas corpus not moot even though prisoner completed his sentence before final adjudication because conviction resulted in certain collateral consequences to the individual). Fassler's pretrial detention, however, carries with it none of the disabilities or burdens which have concerned the Court. For instance, Fassler is not barred from future occupations because of his pretrial detention. Nor does his pretrial detention exclude him from later participation in elections or deny him the opportunity to serve as a juror.

Notwithstanding the mootness of this appeal, Fassler's complaints concerning the basis of his pretrial detention and its effect on the subsequent trial were not unanswered. We believe the allegations of his petition demonstrate instead an ingenious device for securing redundant review of these contentions. Most of his complaints could have been or were dealt with by the district court's review of the magistrate's pretrial detention orders. Fassler contends, for instance, that the magistrate improperly relied on evidence of Arizona charges which may have been later dropped and erroneously evaluated their significance under the Bail Reform Act. See 18 U.S.C. §3142(g)(3)(B). The district court's opinion on review of the detention order specifically considered this issue. Fassler contends that he was unable to prepare for trial while he was incarcerated and that this severely hampered his defense, in view of his considerable experience as an investigator and a criminal law paralegal. The Bail Reform Act,

however, states that any pretrial incarceration order shall afford a defendant the opportunity reasonably to consult with counsel and prepare his defense. 18 U.S.C. §3142(i)(3). Fassler could have moved for additional relief to prepare his defense, or he could have challenged this facet of detention on review by the district court, but it appears that he did neither. We cannot review this contention because he did not raise it before the district court. Pierce v. United States, 525 F.2d 933 (5th Cir. 1976).

[3] Additionally, Fassler contends vigorously that the threat of pretrial detention was employed to coerce a guilty plea.[4] The district court, ruling on Fassler's §2241(c) petition, rejected this

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[4]Fassler also contends that the pretrial detention imposed a severe financial hardship. We pretermit further discussion of this issue, noting that it is not relevant to the determination of whether pretrial detention is warranted. Section 3142(g) identifies those factors to be considered in the pretrial detention hearing. The financial resources of the defendant are relevant only insofar as they reflect the likelihood that the defendant will appear before the court when required.

contention because, as Fassler had gone to trial, the coercion was evidently unsuccessful. There is no reason why Fassler could not have alleged such a claim in his appeal from the magistrate's detention orders, at a time that it would have been entitled to expedited consideration.[5] Finally, to the extent that Fassler characterizes his objections to pretrial detention as implicating the constitutionality of that order, he plainly could have pursued that issue in his appeal pursuant to §3145. The district court overruled it in its order on the §2241 petition, however, and we concur

Other charges connected to Fassler's pretrial detention can be pursued by him in this Court at a later date. He adverts to what he considers the

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[5]Fassler asserts that the magistrate erred during the detention hearing by refusing to accept his proffers of his affidavit as evidence because of his accompanying refusal to testify. Testimony is not required. See 18 U.S.C. §3142(f)(2); United States v. Parker, 848 F.2d 61 (5th Cir. 1988). The magistrate's error, however, should have been attacked under §3145, and we do not have the full transcript of the detention hearings to determine exactly what happened.

paucity of evidence supporting his conviction, an issue that undoubtedly will be determined on his pending direct appeal. He also asserts that he received ineffective assistance of counsel before trial, in part because of the conditions of his detention. This issue can be raised in a collateral attack on his conviction pursuant to 28 U.S.C. §2255 -- but not now. We have held that a criminal defendant may not collaterally attack his conviction until it has been affirmed on direct appeal. Jones v. United States, 453 F.2d 351, 352 (5th Cir. 1972)

The government has asked us to hold that Fassler has abused the writ of habeas corpus by obtaining two bites at the apple to challenge his conviction and pretrial detention order. We decline to do so, because his approach was novel and not wholly without merit. Similar indulgences will not be afforded criminal appellants in the future. Fassler's maneuver in most cases that we can conceive will result in duplication of effort by

the courts and government with no obvious benefit to be gained by the defendant. The moral of this opinion should be clear: defendants have the responsibility to appeal pretrial detention orders promptly, and we, the courts, have an equal responsibility to adjudicate them promptly.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-3857

LAWRENCE A. FASSLER,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 10/27/88, 5 Cir., 198__, _____ F.2d _____)

(NOVEMBER 21, 1988)

Before REAVLEY, POLITZ and JONES, Circuit Judges.

PER CURIAM:

(XX) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal

Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll ont he reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

APPENDIX C

Transcript excerpts from June 12, 1987 hearing

Testimony of D.E.A. Agent Gigante:
(At transcript p. 3).

Q Was Mr. Fassler arrested on this -- for this case or this offense on May 28th of this year?

A Yes, Sir.

Q Was he indicted by the Grand Jury sitting in the Middle District of Louisiana?

A Yes, Sir, he was.

Q Would you tell the Court what he was indicted for, please?

A Possession of marijuana with intent to distribute and conspiracy to distribute marijuana.

Q What drug was involved in -- or what drug was Mr. Fassler accused of dealing in?

A Marijuana.

(Hearing Transcript, p. 4):

1 Q Do you know approximately how much?

2 A A hundred and sixty-two pounds.

(Id., pp. 5 and 6):

14 Q In doing your background check on Mr. Fassler, were you

15 able to determine if he has any prior criminal

16 convictions?

17 A Yes, he has a murder conviction from 1971 and a federal

18 drug conviction and a state drug conviction.

24 Q Have you been able to obtain any information whether Mr.

25 Fassler is currently on bond or on parole or probation

1 for any other drug offense other than the one he's now

2 under arrest for?

A Yes, Sir, when we arrested him he was out on bond for another marijuana charge out of Tucson, Arizona.

Q Is that a state or federal charge?

A A state charge.

Q Do you know approximately when that offense occurred?

A April of this year.

Q Do you -- are you familiar with the facts of that offense?

A Yes, Sir. He took possession of a suitcase at an airport that was found to contain marijuana.

Q During your investigation have you been able to determine whether Mr. Fassler is involved with any drug other than marijuana?

A Yes. We have information to believe that he is also

involved in heroin dealings.

Q And would you relate to the Court what information --

or why that information -- what the information is that

has led you to believe he's involved with heroin?

A He was witnessed mailing a package at the airport in

Tucson that was received in -- at the New Orleans Airport

(Pages 6 and 7):

and found to contain heroin.[6]

MR. MYERS: I have no further questions, your Honor.

THE COURT: Cross-examination.

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[6]On June 11, 1987, the previous day, the defendant had learned from Tucson D.E.A. agents that this incident had occurred two years before, and that someone other than the defendant had been identified as having made the shipment.

(Page 8):

Q You also indicated that there was some -- you had some knowledge of his being involved in some other charges. I believe one of the charge -- one of the activities was possession of marijuana.

A Yes.

Q Okay. Do you know how much that involved?

A I was told a suitcase full. I'm --

Q I'm sorry.

A I was told a suitcase full. I -- I do not know the exact amount.

Q Okay. You don't know anything about that?

A No, I do not.

APPENDIX D

Transcript excerpts from September 3, 1987 hearing (page 8, lines 12-18)

MR. MYERS: We will -- We will stipulate that during negotiations before Mr. Fassler -- before the detention hearing, that the government represented to Mr. Fassler and his lawyer that if he would agree to plead guilty to the terms of our offer and work with the agents, then we would consider recommending that he be released on a bond. I'll stipulate to that.

APPENDIX E

MOTION FOR CONTINUANCE

Filed September 15, 1987 in open court

This is a typewritten copy of the Motion for Continuance filed in court of Sept. 15th, 1987. The original as filed was handwritten, and this copy is typed from a handwritten copy of the original. It is a faithful reproduction of the original as filed.

The AFFIDAVIT which follows, dated Sept. 15th, 1987, was also filed as a handwritten original, and this typed copy is made from a handwritten copy of that original.

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CASE NO. CRIM. 87-019
	)	
vs.	)	
	)	
LAWRENCE ALLEN FASSLER,	)	MOTION FOR CONTINUANCE
	)	
Defendant.	)	
	)	

COMES NOW the Defendant, Lawrence Allen Fassler, and moves the Court for a continuance of 90 days in the trial date set in this matter, for the reasons set forth below:

I) The present trial date was set on July 31, 1987. At that time the Court indicated that if a continuance would be required the Court would entertain such motion at a subsequent date. Also at that time the Petitioner believed and realized that whether or not he continued to be incarcerated it would be impossible to properly prepare and investigate this case in order to meet

the requirements of due process by the first regularly scheduled trial date, and communicated that belief to this counsel.

In response to Petitioner's concern about a continuance, his counsel assured him that a continuance would be obtained at an appropriate time. Later--on August 13, 1987--and thereafter, Petitioner's attorney continuously assured Petitioner that the Prosecutor would be unavailable, due to resignation, at the first regularly scheduled trial date, and that a continuance would necessarily be set by the parties.

Petitioner relied on the representations of counsel because while he has diligently tried to prepare and investigate the case he has realized at all times that the investigation would not be accomplished in time.

On Sept. 3rd, for the first time, and to Petitioner's surprise, counsel informed the Petitioner that it might become difficult to obtain a continuance. Petitioner's counsel then suggested

that Petitioner accept a plea bargain agreement the Petitioner had rejected three months previously, and continues to reject.

Through Sept. 3rd Petitioner and his counsel have had no discussions as to trial strategy, or preparations for trial, whatsoever, and Petitioner is of the opinion that counsel is woefully unprepared for trial.

On Sept. 8th, 1987, the first time Petitioner saw counsel subsequent to Sept. 3rd, he discussed the above with counsel and insisted that counsel seek a continuance. Counsel replied by informing Petitioner that he would be out of the jurisdiction and that he would contact Petitioner on Sept. 11th to further discuss the matter.

Although Petitioner has continually inquired as to the continuance with his counsel, Petitioner has now become duly concerned that any further delay in filing the Motion for Continuance would prejudice the parties and the Court, advised in the premises. Petitioner therefore feels it incumbent

to immediately inform the Court of some of the many material reasons why a continuance should be granted.

II) Petitioner expects to go to trial in this matter, and believes that he has a meritorious defense at trial. That defense complicated and difficult, and requires extensive investigation and preparation which has not yet been accomplished. Petitioner needs the time herein requested to advance that defense.

Among the many specific items which require further investigation and preparation are the following:

A. Background investigation of Peter Affolter, expected to be the key prosecution witness. Among specific items about Mr. Affolter still requiring investigation are:

1. His background and prior criminal history in Switzerland.

2. His background and prior criminal history in South America.

3. His landholdings in South America, including Brazil, Columbia and Bolivia.

4. His prior criminal history engaged in the smuggling of cocaine from South America to Switzerland through the United States.

5. Outstanding criminal cases against Mr. Affolter and his wife at this time.

B. Background investigation of Allen Haysbert, suspected of being an undisclosed confidential informant in this cause. Specific matter of interest include:

1. Circumstances and disposition of drug charges brought against Mr. Haysbert in 1985, in San Mateo County, California.

2. Circumstances and disposition of drug charges brought against Mr. Haysbert in 1986, in San Mateo County, California.

3. Circumstances and disposition of drug charges brought against Mr. Haysbert in 1987, in Tucson, Arizona, directly related to this case.

C. Circumstances and specifics as to the search of a station wagon in New Mexico which led to this indictment. This search is believed to have been a pretextual stop arranged by the D.E.A. in such a manner as to allow them to deny involvement. Among specific reasons for this belief are the following:

1. Information from one "Tracey" Doe in Tucson, Arizona who had specific knowledge of the details of Petitioner's arrest on the date of that arrest, including information pertaining to events preceding the arrest, and who is reputed to be the close companion of a D.E.A. Agent in Tucson.

2. The circumstances of the search, which are consistent with other such searches in New Mexico generally believed by criminal law professionals in Arizona to be a continuing series of pretextual stops.

3. Statements made to the Petitioner by D.E.A. Agents in this case when he

suggested to them that the search was not what it seemed, including admissions the D.E.A. does engage in such activity and including specifics of other such activity by the D.E.A.

4. Statements made by a New Mexico State Trooper in this Court on July 31, 1987, which are strongly and advisedly believed by the Petitioner to be contrary to the true facts.

5. Information developed by private Investigator Victor Bouchet which suggests D.E.A. involvement in this case in Tucson, Arizona, prior to the search in New Mexico.

D. Prior statements of Peter Affolter both D.E.A. and New Mexico police, which are believed to exist and to be "Brady" material which has not, but should have, been disclosed to the defense by the government.

III) Many, if not most, of the matters listed above, as well as other matters not mentioned herein, could have, and would have, been investigated by the Petitioner personally had he not been

incarcerated during the past 3-1/2 months pursuant to the U.S. Attorney's misuse of the Federal Pre-Trial Detention Act as a Plea-Bargaining weapon. (A fact stipulated by the U.S. Attorney on Sept. 3, 1987, before the Court.)

However, because Petitioner has been incarcerated, because his counsel has not conducted appropriate investigations, and because until the last few days Petitioner believed that the trial date in this case would be continued, the government's misuse of the Pretrial Detention Act has precluded Petitioner from accomplishing such investigation. IV) Since the latter part of July, 1987, Petitioner's present counsel has informed the Petitioner that he needed additional funds to pursue investigation and discovery in this cause. Among specific items mentioned by counsel as requiring such additional monies are the dispatching of investigators or personal travel by counsel to New Mexico, the subpoenaing of witnesses, the service of process, and the general

and extensive investigation suggested by matters discussed earlier in this Motion.

Because of Petitioner's continued pre-trial detention he has been unable to earn and to provide counsel with such funds, and his financial difficulty had prevented the defense from hiring the investigation and discovery herein discussed others.

V) On May 28th and 29th, 1987, D.E.A. Agents representing themselves to be speaking with the authority of the U.S. Attorney, assured the Petitioner that the U.S. Attorney would not pursue the pre-trial detention motion in this case and assured the Petitioner that he would be released on bail after the expiration of the ten day period imposed by the Magistrate. At that time they also made certain demands and representations to the Defendant which induced certain inactions by the Petitioner that have resulted in substantial financial losses to the Petitioner, denying his access to, and the benefit of, a sum estimated at more than

$45,000 which would otherwise have been available to him for use in his defense. U.S. v. Harvey, 814 F.2d 905.

The government made it appear for a period of time after May 29th that the representations, assurances, and demands made by the D.E.A. Agents at that time continued in effect, thereby effectively depriving the Petitioner of the financial resources which would have otherwise been available to his defense.

VI) Additional and further items which should also be investigated include the following:

A. Further investigation and interviews, or attempts to interview, many and varied New Mexico Police Officers and other non-police witnesses and parties to other searches in New Mexico similar in circumstance to the search in this case, to support the contention that pretextual stops and arrests in New Mexico are common and to support the contention that the stop and search in this case was a sham and a pretext.

B. Further investigation of Peter Affolter and other witnesses in respect to any deals, plea bargains, or other gratuities given to each or any of them in respect to this and any other case. This information is potentially vital to my defense for the possible defenses of entrapment, lack of knowledge, frame-up, or mistake of fact, as well as others. To deprive the defendant of the potential investigation of these matters would deprive the defendant of due process of law.

VII) A Severance Motion filed on behalf of co-defendant Charles Lee has been pending before this Court for more than a month. The disposition of that Motion has a potentially very important impact on my defense and may materially affect the nature of that defense.

Until it is known whether Mr. Lee is to be a co-defendant at trial it is impossible to plan a definite defense. At this time the defense does not know if Mr. Lee will be available as a friendly witness, or, indeed, a potentially hostile witness.

The ultimate resolution of this question is vitally important to the final defense strategy in this case.

VIII) On Sept. 8, 1987, the U.S. Attorney filed allegations of prior convictions for sentence enhancement in this matter. It is now additionally necessary that the Petitioner gather and prepare such materials as may be necessary to refute these newly filed allegations.

It is also now advisable and desired by the Petitioner that he investigate the ramifications of this new filing by the U.S. Attorney and weigh its impact upon the defense and defense strategy in this cause; which he may well be unable to adequately do in the short time remaining before the first scheduled date for trial.

IX) On Sept. 9, 1987, just minutes before was to mail the foregoing, I was advised by counsel, by messenger, that the principal witness, Mr. Affolter, could not be located and that the government would likely not be ready to proceed to trial on

Sept. 15th, and that counsel would see me on Sept. 11th.

On Sept. 11th and 12th and 14th counsel advised me of new items of evidence was being advised of by the Prosecution on a daily basis, and on Sept. 14th he also advised me that he was going to seek a continuance and believed that he would get it without filing this Motion, which I suggested he append to his own. At 6:30 P.M. on Sept. 14th I learned that his Motion had been denied.

For these reasons this Motion is being filed at this late date.

X) In light of the unexpected unavailability of Mr. Affolter at trial, it is now the intent and desire of the Petitioner to seek to locate Mr. Affolter for use as a defense witness, and/or to impeach other prosecution witnesses.

Petitioner does have reason to believe, and believes, that he might succeed in locating Mr. Affolter where the Prosecution has failed.

XI) The Defense needs additional time to prepare appropriate motions challenging the newly revealed evidence, to seek a severance in light of the nature of some of such evidence, and to investigate the facts and circumstances surrounding the discovery of such evidence, and surrounding securing of new witnesses in respect thereto by the government.

WHEREFORE the Petitioner respectfully prays this Court for its Order continuing the trial date for a period of 90 days.

Respectfully submitted this 14th day of September, 1987.

/s/ Larry Fassler

Larry Fassler, pro se

AFFIDAVIT OF SERVICE

I have mailed a copy of the preceding Motion for Continuance, 1st Class postage prepaid, to Bradley Myers, Asst. U.S. Attorney, 707 Florida St., Baton Rouge, LA, by depositing same in the mailbox at East Baton Rouge Parish Prison this 15th day of Sept., 1987.

Larry Fassler, Affiant

NOTE: This Motion was filed in open court the morning of September 15th, 1987, before the trial began.

APPENDIX F

AFFIDAVIT

On or about Sept. 4, 1987, I caused to be sent by Federal Express a Writ of Habeas Corpus petition to the U.S. District Court for the Central District of Louisiana, together with a money order for $120.00 which I had been told by the Clerk's Office was appropriate.

On Sept. 8th I spoke to "Pam" at the Clerk's Office by phone and verified receipt of my Petition. At her direction I spoke again to that Office at approximately 4:45 P.M., at which time a man identifying himself as a "Deputy Clerk" advised me that my Petition would be filed as part of my criminal case file and not as a separate civil matter, as I had expected and intended and though proper. He also told me that there would be no additional filing fee and that my $120.00 would be returned to me. At the same time he also asked that I send in an additional copy with my own

original signature, which I agreed to do and did that same day.

On Sept. 9th the Clerk's Office wrote to me asking for a $5.00 fee before returning my $120.00 money order.

For the foregoing reasons I believed that my Petition for a Writ of Habeas Corpus would be treated as part of my criminal case until I heard differently from Judge Parker on Sept. 15, 1987, in open court.

Signed under penalty of perjury this 15th day of Sept., 1987.

/s/ Larry Fassler

Larry Fassler

NOTE: This affidavit was filed in open court on Sept. 16, 1987. When tendered to the Court by Mr. Fisher, Judge Parker instructed him to file it in the Clerk's Office, and he did.

APPENDIX G

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	)	CRIMINAL NO. 87-019
	)	
vs.	)	PETITION FOR A WRIT OF
	)	
LAWRENCE A. FASSLER and CHARLES E. LEE, JR.	)	HABEAS CORPUS

COMES NOW the Petitioner, Lawrence A. Fassler, and petitions this Court for a Writ of Habeas Corpus ordering the release of Petitioner from the Detention Order issued by U.S. Magistrate Stephen Reidlinger on May 19, 1987, for the reasons which follow:

REASONS WHY THE WRIT SHOULD ISSUE

I) The Detention Order is being illegally and unconstitutionally imposed as a punitive plea bargaining tool.

II) The Detention Order was imposed in denial of Petitioner's statutory and constitutional rights to confront and answer the allegations and evidence against him.

III) The Detention Order was imposed by other than an impartial Magistrate in violation of Petitioner's statutory and constitutional rights.

IV) The Detention Order imposes an excessive and unnecessary extra burden upon the defense, unjustified by any legitimate regulatory interest of the government, and to that extent violates the Petitioner's constitutional rights to bail and to aid in his own defense.

STATEMENT OF FACTS

I. FACTS IN SUPPORT OF REASON NUMBER I ARE:

A On May 29, 1987, DEA Agent Claude Davidson told Petitioner that the detention motion had been made that day by the U.S. Attorney as a diversionary ploy to mislead associates of the Petitioner while the government sought to perfect a secret plea bargain with the Petitioner, and would be withdrawn before it was heard by the Court.

B. On June 1, 1987, U.S. Attorney Brad Myers informed defense attorney Rosemary Bickford that the detention motion would be dropped if the Petitioner pled guilty to charges carrying a maximum exposure of 30 years.

C. On June 9, 1987, U.S. Attorney Brad Myers informed Rosemary Bickford and the Petitioner that he would drop the detention motion only if the Petitioner pled guilty to charges carrying a maximum exposure of 20 years.

D. On June 11, 1987, DEA Agent Ed Descenzo of Tucson, Arizona, specifically claiming to speak with the authorization and approval of U.S. Attorney Brad Myers, told defense attorney Rosemary Bickford and the Petitioner that the government would drop the detention motion only if the Petitioner first paid over to the DEA the sum of TWO HUNDRED THOUSAND to TWO HUNDRED AND FIFTY THOUSAND ($200,000.00 - $250,000.00) DOLLARS.

E. On June 24, 1987, U.S. Magistrate Stephen Reidlinger informed defense attorneys Rosemary Bickford and Anthony Marabella that he would reconsider his detention order if the Petitioner agreed with DEA agents in Tucson, Arizona, to act as a confidential informant for them.

II & III. FACTS IN SUPPORT OF REASONS NUMBER II AND III ARE:

A. On June 12, 1987, U.S. Magistrate Stephen Reidlinger issued a detention order in which he stated as reasons that the Petitioner was engaged in the sales of heroin and that according to law enforcement officials in Arizona the Petitioner had a very violent character.

The Petitioner has never been confronted with any such evidence with the exception of remote hearsay from DEA Agent Gigante which was immediately disclaimed by the U.S. Attorney.

B. On June 24, 1987, in chambers, before a scheduled proceeding on the detention motion, U.S. Magistrate Stephen Reidlinger informed defense

attorneys Rosemary Bickford and Anthony Marabella that he would recant his allegations of heroin involvement and threat of violence as reasons for the detention motion, after being informed by the U.S. Attorney, as well as defense counsel that the government was not alleging those grounds for the detention order.

The Petitioner has never been confronted with the evidence upon which the Magistrate based his declaration of intent to recant.

C. On June 24, 1987, in open Court and immediately following the in chambers session described in (B) above, U.S. Magistrate Stephen Reidlinger once again stated as a reason for maintaining his Detention Order that the Petitioner is engaged in the trafficking of heroin.

D. On June 24, 1987, in open court, U.S. Magistrate Stephen Reidlinger also stated as a reason for maintaining his detention order his belief that no conditions of release could reasonably assure that the Petitioner would not continue

to send others on scheduled flights with the Petitioner's narcotics.

The Petitioner has never been confronted with any evidence nor allegation of such conduct.[1]

IV. FACTS IN SUPPORT OF REASON NUMBER IV ARE:

A. In seeking the Detention Order from which this writ prays release, the United States,

(1) Concedes no risk of flight;

(2) Concedes no danger to witnesses;

(3) Alleges no continuing criminal enterprise;

---

[1]During the hearing of June 24, 1987, the Defendant entered exhibits intended to show the Magistrate that the Arizona indictment then pending was based on false testimony by the Arizona detective to the Grand Jury. It is possible that the Magistrate read only the false testimony to the Grand Jury by the police officer and did not read the police transcript of the underlying interview which shows that Grand Jury testimony to be false.

Indeed, on July 10, 1987, the Arizona Superior Court remanded that indictment, making reference to the failure of the officer(s) testimony to accurately represent the facts. That indictment has not been refiled, and the statutory period to do so has expired.

(4) Has presented no clear and convincing evidence of danger to the community.

B. Two other individuals have been arrested and charged in this case. One, Charles Lee, was released on TWENTY FIVE THOUSAND ($25,000.00) DOLLARS bail. The second, Allen Haysbert, was released on TEN THOUSAND ($10,000.00) DOLLARS bail, not withstanding the fact that at the time of his release he was free on appeal bond from a California conviction for possession of narcotics in 1984, and also free under an appearance bond for California charges of possession of narcotics in 1986.

C. The Petitioner lives in Tucson, Arizona, and is employed in Burlingame, California.

D. All of the events leading to Petitioner's arrest in Baton Rouge, LA, appear to have occurred in the States of Arizona, California, and New Mexico. Thus, the focus of investigation as preparation of Petitioner's defense is in those states.

E. Petitioner is being detained in Baton Rouge, LA.

F. Petitioner has been ordered by U.S. Magistrate Stephen Reidlinger to finance his own defense.

G. If free on bail, Petitioner would be earning ONE THOUSAND ($1,000.00) DOLLARS weekly at his employment. While confined, Petitioner's earnings have been reduced to TWO THOUSAND ($2,000.00) DOLLARS monthly.

H. Petitioner's reduced earning capacity while in custody is in jeopardy because he is unable to receive mail from his employer while in custody. Efforts by both Petitioner and his employer to seek redress and/or explanation for this situation from both the Parish Prison and the U.S. Magistrate have been nonproductive.

I. Petitioner has extensive experience and a high degree of skill in the defense of criminal cases, having spent many years in such employ. He has researched, prepared and filed many writs and

appellate briefs on behalf of himself and others, several of which have prevailed in courts of various jurisdictions, including the Supreme Court of the United States.

Petitioner has also played a significant and active role in his own defense in other previous prosecutions which were ultimately resolved in his favor.

J. The Petitioner has personal investigative skills and resources which he would use on his own behalf if free on bail.

K. While in parish Prison, Petitioner's only effective means of communication with his counsel and other defense resources in Arizona is by long distance telephone, and is both limited in time and privacy, and expensive in nature.

L. In order to better aid in his own defense, the Petitioner is seeking to overturn the Detention Order, both in propria persona and through counsel. This effort has entailed, and continues to entail, substantial personal and legal expenses to

Petitioner which impinge upon, and deprive him of, already limited financial resources necessary for the defense in chief of his case.

M. The cost of Petitioner of maintaining personal and business ties with his family and interests in Arizona is significantly enhanced by virtue of his detention, and to the extent that those costs exceed what they would be in the absence of a detention order, they deprive the Petitioner of already limited financial resources for his defense.

N. Although there is a small and limited "Law Library" at the Parish Prison, Petitioner, as virtually all other inmates of the prison, has no meaningful nor useful access to it.

O. Petitioner has lived in Tucson, Arizona for 41 years, in the same house since 1954, and has all of his personal and business roots there. He is married and the father of three children, all of whom he currently supports.

ARGUMENT

I

THE DETENTION ORDER IS BEING ILLEGALLY AND UNCONSTITUTIONALLY IMPOSED AS A PUNITIVE PLEA BARGAINING TOOL.

The Detention Motion was made for reasons unrelated to those prescribed by law, and as such it is, prima facie, constitutionally faulty and must be reversed.

Assuming, for the sake of argument, that notwithstanding the statements made by DEA Agent Davidson to the Petitioner, the motive of the U.S. Attorney in filing the motion was pure, it is nevertheless clear that the government's reason for maintaining the motion was illegal and unconstitutional.

On at least three different occasions the prosecution used the threat of the Detention Motion as a plea bargaining tool to coerce a plea from the Petitioner on terms less favorable to him. Such use of the detention motion is contrary to

both the statutory and constitutional authority for the motion.

And finally, on June 24, 1987, the U.S. Magistrate who issued the Detention Order, himself indicated to the Petitioner, through counsel, that he would remove the order if the Petitioner would act as a confidential informant for the DEA. Plainly, this is the most serious abuse of a civil regulatory power for purpose of unfairly influencing the outcome of a criminal case, and is an unconscionable, if not criminal, corruption of any legitimate regulatory purpose of 18 USC.

II

THE DETENTION ORDER WAS IMPOSED IN DENIAL OF PETITIONER'S STATUTORY AND CONSTITUTIONAL RIGHTS TO CONFRONT AND ANSWER THE ALLEGATIONS AND EVIDENCE AGAINST HIM.

By the statements made in his Detention Order of June 12, 1987, U.S. Magistrate Stephen Reidlinger provided conclusive proof that he considered "fact" or "evidence" not before the court when he first issued his detention order. The only

other possible explanation for his findings in regard to heroin and violence would be that he created them out of whole cloth.

Further, on June 24, 1987, in chambers, Magistrate Reidlinger, by agreeing to recant his earlier findings, evidenced his subsequent receipt of other, contrary, evidence on the same issue. It makes no difference that the evidence he entertained out of court was on the one hand hostile to the Petitioner's interests, and on the second hand friendly to the Petitioner; it was equally unconstitutional in both instances.

The invidious nature of such extrajudicial fact-finding is amply demonstrated once again, by the Magistrate's own words for in the proceedings of June 24th, after he had recanted his findings of heroin and violence, he once again used the allegation of heroin involvement as a basis for his ruling.

When, on June 24th, he also claimed that the Petitioner was sending others on flights with the

Petitioner's drugs, he was once again basing his order on evidence or allegations not before the Court.

It is unknown where the Magistrate got the serious allegations he used in his rulings from the bench -- but they were not made in court and the Petitioner had no opportunity to confront them.

It makes no difference whether the Magistrate sought out and made independent inquiry of "law enforcement agents", or if the U.S. Attorney whispered in his ear; whichever be the case it is incontrovertible that the Magistrate was both receptive to, and influenced by, such illegal influence -- as his own words conclusively establish.

III

THE DETENTION ORDER WAS IMPOSED OTHER THAN AN IMPARTIAL MAGISTRATE IN VIOLATION OF PETITIONER'S STATUTORY AND CONSTITUTIONAL RIGHTS.

As set forth in the statement of facts part II and III and argued in the preceding section, U.S. Magistrate Stephen Reidlinger has repeatedly been

receptive to, and has used as basis for his findings, facts not legitimately before him. Further, as set forth in the Statement of Facts part I (E), the Magistrate has lent himself to the Prosecution's efforts to coerce a plea agreement from the Petitioner through illegal and unconstitutional use of the detention motion.

These facts, taken as a whole, or individually, raise such serious doubt as to the impartiality of the Magistrate that they give the appearance of partiality, and, a fortiori, put the authority and respect due the judiciary clearly ont he side of the prosecution.

IV

THE DETENTION ORDER IMPOSES EXCESSIVE UNNECESSARY EXTRA BURDEN UPON THE DEFENSE UNJUSTIFIED BY ANY LEGITIMATE REGULATORY INTEREST ON THE GOVERNMENT, AND TO THAT EXTENT VIOLATES THE PETITIONER'S CONSTITUTIONAL RIGHTS TO BAIL AND TO AID IN HIS OWN DEFENSE.

The existence of the detention order in this case has the unusual effect of severely hampering the Petitioner's defense. This is so because the

Petitioner is an able and experienced paralegal capable of great service to his own defense, but he is unable to use his own personal skills and abilities under his present conditions of detention.

The detention order also severely hampered the Petitioner's ability to finance his defense -- as ordered by the court -- because it imposes substantial extra costs on the Petitioner. These extra costs include those related to the fight against the detention order itself -- unusually justified in view of this Petitioner's personal legal skills -- as well as the costs of long distance calls, the hiring of investigators and paralegals to do work this Petitioner would normally do himself, the extra travel costs for legal aides to come to Baton Rouge from Arizona and California for consultation and the many additional indirect expenses imposed by the unusual distances involved in this case between the situs of most investigation activity and the site of his detention in Baton Rouge.

The detention order and the actual conditions of detention in this cause also impose a discriminatory financial penalty on the Petitioner by substantially reducing his earnings. As testimony at the initial appearance and at the detention motion hearing established, the Petitioner would be earning $1,000.00 a week if free on bail, but is earning only $2,000.00 a month while confined. Further, even these limited earnings while confined are now jeopardized by the Petitioner's inability to communicate by mail with his employer while in the Parish Prison.

These adverse effects of the detention order on the Petitioner's ability to personally assist in his own defense and to most effectively marshal his limited financial resources toward his own defense, when compared to the minimal -- if even sufficient -- justification for the detention order combine to have the constitutionally infirm effect of denying the Petitioner his right to assist in his own defense, as well as his right to bail, to a degree

unjustified by the legitimate regulatory interest of the government. Hence, the detention order in this case is unconstitutional and should be set aside.

CONCLUSION

The detention motion was made for reasons other than those authorized by statute, and as such it should be set aside.

The detention motion has been maintained and used for plea bargaining purposes, and as such is a travesty of the American heritage of criminal justice and constitutional law, and must be set aside.

The detention order was imposed by a Magistrate who received and was influenced by facts not in evidence, in violation of statute and of constitutional authority, and must therefore be set aside.

The detention order was imposed by other than an impartial magistrate and as such it must be set aside.

The detention order imposes an excessive and unnecessary extra burden on the defense, totally out of balance to the slight -- if even sufficient -- regulatory interest of the government, and is therefore constitutionally impermissible and must be set aside.

RESPECTFULLY SUBMITTED this ____ day of August, 1987.

LAWRENCE A. FASSLER
PETITIONER

STATE OF)
) ss.
COUNTY OF)

AFFIDAVIT

I, LAWRENCE A. FASSLER, being first duly sworn upon my oath, depose and state that to the best of my knowledge, the facts contained in the foregoing Petition for a Writ of Habeas Corpus are true and correct.

LAWRENCE A. FASSLER

SUBSCRIBED AND SWORN TO before me this _____ day of _____, 1987, by LAWRENCE A. FASSLER.

NOTARY PUBLIC

APPENDIX H

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
SEPTEMBER 30, 1987
PARKER, C.J.

UNITED STATES OF AMERICA

CIVIL ACTION

VERSUS

NO. 87-789-A

LAWRENCE A. FASSLER

* * * * * * * *

Lawrence A. Fassler has filed a pro se petition for a writ of habeas corpus[1] seeking to be released from the detention orders issued by the

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[1]Although habeas corpus is generally a post-conviction remedy, the federal courts have in certain circumstances considered writs of habeas corpus brought prior to trial under 28 U.S.C. §2241(c)(3). See **Braden v. 30th Judicial Circuit Court of Kentucky**, 410 U.S. 484, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973) (habeas corpus proceeding brought by state court prisoner on speedy trial grounds); **Gully v. Kunzman**, 592 F.2d 283 (6th Cir.), cert. denied 442 U.S. 924, 99 S.Ct. 2850, 61 L.Ed.2d 292 (1979) (habeas corpus proceeding brought by state court prisoner on double jeopardy grounds). In this case, the court has the power to entertain Fassler's writ under §224(c)(1) since he is in custody in this district "under or by color of the authority of the United States."

Magistrate on May 19, 1987, and June 24, 1987. The government has filed a written response. The court finds that there is no need for an evidentiary hearing and that the writ should be denied for the following reasons.

Fassler's argument is that the detention order was illegally and unconstitutionally imposed as a punitive plea bargaining tool. Essentially, Fassler claims that the Assistant United States Attorney would not have made or pursued the motion for detention order if Fassler had agreed to plead guilty and paid the Drug Enforcement Agency the sum of $250,000. The government denies the latter allegation.

Accepting Fassler's allegations as being true, the court finds no merit in this argument. Initially, the court notes that Fassler filed his petition on September 10, a few days before his trial on September 15 - 16, which resulted in his being found guilty on both counts of the indictment. Since Fassler did not plead guilty, the

alleged illegal plea bargaining tactics of the prosecutor would seem to be irrelevant. Furthermore, since Fassler is no longer being detained upon the detention order that the government moved for under 18 U.S.C. §3142, but is being detained under §3143 by virtue of his being convicted, the issue is now moot.

Although the other grounds raised in the writ may likewise be moot, the court will consider these arguments in view of the fact that they could possibly be relevant to a motion for release from his present detention under §3143. Fassler's second and third grounds are that the magistrate considered matters that were not in evidence thereby depriving him of his right of confrontation and raising "serious doubts" as to the impartiality of the magistrate.

These argument have no merit. The court has previously conducted a de novo review of the magistrate's detention orders and has carefully reviewed the transcripts of the hearings and

exhibits, as well as additional evidence presented in this court. As indicated in the court's ruling on September 10, 1987, there was clear and convincing evidence to support the magistrate's conclusions. The court further found the magistrate's reasons to be well founded.

Fassler's final argument is that an "excessive and unnecessary extra burden . . . unjustified by any legitimate regulatory interest of the government" was placed upon him at the detention hearings. Fassler claims that this extra burden violated his constitutional right to bail and to aid in his own defense.

In ordering Fassler's detention, the magistrate and the court acted pursuant to 18 U.S.C. §3142. Essentially then, Fassler is challenging the constitutionality of §3142, which authorizes the pretrial detention of arrestees charged with serious felonies who are found to pose a threat to the safety of the community which no condition of release can dispel. A similar argument was made and recently

rejected by the Supreme Court in **United States v. Salerno**, ____ U.S. ___, 107 S.Ct. 2095, ___ L.Ed.2d (1987). The court further finds Fassler's argument relating to his inability to prepare his defense to be unpersuasive. Fassler has failed to point to any specific prejudice to his defense, nor has he in any way suggested that the preparation by his attorney has been inadequate.

Accordingly, the petition for writ of habeas corpus has no merit and will be DENIED.

* * * * * *

/s/ JP

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

CIVIL ACTION

VERSUS

NO. 87-789-A

LAWRENCE A. FASSLER

JUDGMENT

For the written reasons assigned and filed herein:

IT IS ORDERED ADJUDGED AND DECREED that petitioner's writ of habeas corpus be, and it is hereby DENIED.

Baton Rouge, Louisiana, October 6, 1987.

/s/ John V. Parker
JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPENDIX I

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
OCTOBER 26, 1987
PARKER, C.J.

LAWRENCE A. FASSLER

CIVIL ACTION

VERSUS

NO. 87-789-A

UNITED STATES OF AMERICA

* * * * * * * * *

Petitioner, Lawrence A. Fassler, has filed a pro se "Motion For Rehearing" on the denial of his petition for writ of habeas corpus, claiming he was unfairly deprived o an opportunity to respond to the government's answer to the writ. Fassler also filed a "Reply to Respondent's Answer" in support of his motion for rehearing.

A review of these pleadings discloses no new arguments pertinent to the habeas corpus petition, which relates solely to the detention orders. Fassler's additional claims of prejudice relating to

evidence presented at trial are not within the scope of these proceedings.

Accordingly, the motion for rehearing is without merit and is hereby DENIED.

Baton Rouge, Louisiana, October 26, 1987.

/s/ John V. Parker
JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPENDIX J

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

VERSUS

CHARLES LEE, JR. AND LAWRENCE FASSLER

CRIMINAL NO.: 87-19-A

AFFIDAVIT

BEFORE ME, the undersigned Notary Public, personally came and appeared:

MICHAEL STEPHEN SHEPHERD

Who, being duly sworn, deposed and said the following:

I was contacted by Attorney Nathan S. Fisher to view and listen to a V.H.S. Videotape involving a client of Mr. Fisher's. With no knowledge other than it involved an unnamed client, I attempted to electronically process the audio portion of the V.H.S. Videotape, with the goal of transcribing the conversation(s) of the tape.

The audio portion of the tape was found to have broad band radio "Noise" (static, hum, etc.) to a degree generally equal to that of the actual transmitted signal on the audio recording.

After trying numerous combinations of equalization and noise reduction techniques, I found it would be impossible to transcribe the audio accurately, if at all.

I requested information from Mr. Fisher as to whether the individuals on the videotape could be possibly speaking in a "cajun" dialect or accent, and was informed that was not the case.

I was later qualified in Federal Court as an expert witness and testified to the above.

Subsequent to that testimony, I was asked by Mr. Fisher to review and comment on the testimony of government witness Trooper Gurley Hamilton Mixon III.

After several readings of Trooper Mixon's testimony and re-listening to the complete audio portion of the videotape, I have come to the

following conclusions:

1.

The audio portion of the videotape is and has always been unintelligible and inconclusive as to anything that may have been said between the principals on the videotape.

2.

Because of the camera "framing" of the picture and the principals, it cannot be determined which individual is speaking any point, which, when combined with the tape's lack of audio intelligibility renders it impossible to objectively attribute a particular utterance to a specific principal on the videotape.

3.

It is my opinion that the "noise" on the audio portion of the videotape was induced at a point prior to the audio signals exit from the receiver which picked up the wireless microphones's transmission.

By testimony of Trooper Mixon, the transmission distance of 75 to 100 yards was a borderline acceptable distance for reception, especially in the area designated the site; an area very prone to interference from microwave transmission interference from the numerous signal paths in use in that area.

Regarding the testimony of Trooper Mixon that the "noise" was introduced to the system through a wire connecting the receiver to the V.H.S. videotape recorder, I cannot agree with his statement. The noise from an improperly installed or improperly filtered power supply to in an air conditioning system would more readily attack an "in use" receiver than an interconnecting wire (as stated by Trooper Mixon). Further, had this interference been so strong as to penetrate an interconnecting cable (wire) in the manner described by Trooper Mixon, it would have almost certainly penetrated the wire interconnecting the video camera to the V.H.S. videotape recorder, of

which no evidence is seen in the video portion of the tape which is quite clear and free of grounding or static interference.

Additionally in listening to the complete videotape, including the portions after the arrest had occurred, the audio clears with the apparent interruption of the receiver, providing a normal audio track free of interference, this according to Trooper Mixon's theory, would only have been possible had the interconnecting wire been unplugged at the videotape recorder end.

4.

Due to the factors of distance, geographic location, and analysis of "noises" and interferences heard, it is my opinion and belief that the audio interference occurred between the point of transmission (wireless microphone transmitter) and the point of reception (van housing wireless microphone receiver).

5.

I regard Trooper Mixon's testimony that he (or anyone else listening to the source used to make the videotape) heard a clear or different quality of audio to be at the very best highly improbable if not impossible. I believe that the videotape represents the appropriate quality of audio transmitted, received, recorded and heard in this situation.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

VERSUS

CHARLES LEE, JR. AND LAWRENCE FASSLER

CRIMINAL NO.: 87-19-A

AFFIDAVIT

BEFORE ME, the undersigned Notary Public, personally came and appeared:

LARRY L. WARD

Who, being duly sworn, deposed and said the following:

On or about the twentieth day of October, 1987, I had the opportunity to view and hear a certain recording that I was told pertained to the trial of U.S.A. vs. Lawrence Fassler, et al. I offer the following benefits and professional opinions as to what I heard and saw on the above mentioned tape.

I heard three distinct signals recorded on the audio portion of the tape. There was a very

intense noise, an unmodulated carrier of short duration, and a very weak carrier with modulation somewhat lower in amplitude than the noise level. The minor quieting effect produced by the unmodulated carrier upon the noise leads me to believe that the noise was of the same nature as that of the other signals primarily being received via the antenna system and not through any other wired sources. Having read a portion of the transcript of the trial on September 15, 1987, I can only speculate as to the exact way that the system for recording the above mentioned tape was connected. There was mentioned a certain "wire" between the receiver and the recorder that was picking up the noise. I do not believe that this "wire" an apparent output connection was acting as a part of the antenna system. Also, it is my understanding that there were no other tap connections to this "wire" connection and that certain signals were heard clearly meaning that there was less of an absence of the noise that was present on

the recording. At no time did I hear cessation of the noise to the level that I could understand or comprehend the modulated carrier that was present and mixed with the noise. From the signals that I heard recorded on the tape, it is my belief and personal opinion that the mixed signals existed throughout the entire audio chain including the actual recording voltage presented to the audio recording head of the recorder and short of some deciphering device of which I have no knowledge were recorded exactly as was received on the antenna of the receiver apparatus.

From years of experience I have found it very difficult to separate signals after mixed when they are of a wide frequency range. A single tone type of signal is easy to filter from a band of frequencies. From experience and facts gained from hearing and viewing the recorded tape, I do not believe that the recording device was contributing to or was receiving any of the observed noise signal through any other means than the

"wire." I base my reasoning upon the fact that I saw no evidence of noise present upon or affecting the quality of the video picture. Experience has shown me that most electrical noise interference of the nature that I heard on the audio recording if introduced through a power source would appear in the output of and device to a more or less extent depending upon the degree of filtering ability of the power supply. An unmodulated carrier received by an antenna system will not reduce a noise that is being received through the power supply of the receiving or recording device. An unmodulated carrier will have the effect of reducing noise received via the antenna system as in the audio recording that I heard. The carrier must be of sufficient strength to effect this reduction of noise. This action is well known in the radio field as "carrier to noise ratio." In the case of the modulated carrier mentioned as one of the observed signals recorded on the audio portion of the tape, it was very apparent to me that the

"ratio" was very poor, the carrier present was so weak as to present very little quieting effect and thus a very low "carrier to noise ratio."

In summary, after reviewing the videotape and transcript of Trooper Mixon it is my opinion that his statements regarding having heard a more clear conversation than was recorded on the audio portion of the videotape is highly improbable and unlikely.

Further, I submit the following qualifications for the courts perusal:

Larry L. Ward
6628 Highland Road
Baton Rouge, Louisiana 70808
Telephone: (504) 766-4663

Date of Birth: 7-27-38
Age: 49
Employment:

Baton Rouge Broadcasting WJBO, WFMF-FM, Southern States Network

Position: Chief Engineer

Experience and Education:

30 years experience in broadcast engineering and electronics.
Federal Communications Commission Radiotelephone License.

Devry Institute, Electronic Instrumentation and Control. BS Degree at L.S.U. concentrating in Electrical Engineering, Geology, Nuclear Science, Business and Social Studies.
16 years in two way radio installation and service.
Chief Engineer of Radio Stations since age of 18.
Numerous Applications and Exhibits accepted and on record-FCC.
Four years as electronics in Naval Reserve.
Electronics Instructor WKG Video Electronic College.

I submit the above beliefs and professional opinion based solely on the tape recording and portion of the trial transcript (Trooper Mixon's testimony) that I have reviewed.

THIS DONE AND PASSED in my office in Baton Rouge, Louisiana this 3rd day of November, 1987, in the presence of the undersigned competent witnesses.

WITNESSES:

/s/ Melissa B. Garrison

/s/ Jill E. Lishank

/s/ Larry L. Ward

/s/ Notary Public